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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

Docket No. 363

IN THE MATTER
OF
LAWRENCE S. INGOGLIA,
Petitioner,

against

HAROLD M. SPITZER,
Respondent.

Petiiton for a Writ of Certiorari to the Court of Appeals of the State of New York.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 RE 2-6978—1969

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IN THE

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October Term 1968.

Docket No.

IN THE MATTER

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LAWRENCE S. INGOGLIA,

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against

HAROLD M. SPITZER,

Respondent.

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE COURT OF APPEALS.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

The petitioner above named respectfully prays that a writ of certiorari issue in the above-captioned case, directed to the Court of Appeals of the State of New York, to review its order dated April 10, 1969, and entered in the office of the clerk of that court on April 10, 1969 (A15).[1]

[1]Parenthetic references are to the Appendix hereto unless otherwise noted.

Opinions Below.

The only opinion (A6) below was that which accompanied the order of the Appellate Division of the Supreme Court of the State of New York, Second Department (A1), on September 9, 1968, reported in 30 A. D. 2d 921.

The Court of Appeals affirmed the order without opinion.

Jurisdiction.

The order of the Court of Appeals was dated and entered on April 10, 1969. The jurisdiction of this honorable court is invoked under Title 28, United States Code, Section 1257.

Proceedings Below.

This disciplinary proceeding under Section 90 of the Judiciary Law was instituted against the petitioner by Harold M. Spitzer, Chief Counsel for the Judicial Inquiry on Professional Conduct for the County of Nassau, pursuant to an order of the Appellate Division, Second Judicial Department, dated July 17, 1967, alleging certain acts of professional misconduct on the part of attorneys and counsellors at law. Petitioner filed an answer denying the material allegations of the petition. Thereafter, by order dated September 27, 1967, the Appellate Division referred the issues raised by the pleadings in four separate proceedings to Hon. L. Barron Hill, Justice of the Supreme Court for hearing and report, and together with his findings, the said Justice, in effect, consolidated the proceedings by holding joint hearings thereon.

Thereafter, on April 5, 1968, the said Justice filed his report, together with the testimony and exhibits, containing express findings of fact on all of the issues raised in the proceedings and setting forth, as he was directed to do so by the Appellate Division, his opinion that so far as petitioner was concerned, charges "1," "2," "3" and "4" had been sustained. The said Justice recommended that the petitioner be disbarred. The Appellate Division in a single order annexed hereto (A), confirmed the said Justice's report to the extent that the petitioner, Lawrence S. Ingoglia, was disbarred. Petitioner then timely served and filed notice of appeal as of right to the Court of Appeals (A13).

On or about April 10, 1969, the Court of Appeals affirmed the order of the Appellate Division, without opinion in so far as it had found that the charges against the petitioner, Lawrence S. Ingoglia, except 5-B (1) contained in the petition had been sustained.

All available remedies in the state of New York have now been exhausted and proceedings in the state are concluded and final.

Questions Presented.

1. Whether the grant of immunity, which forced the petitioner to answer the criminating questions put to him, resulting in his disbarment, is a full substitute for the surrender of his constitutional privilege against self-incrimination, or is an abridgement of his constitutional rights under Amendments V and XIV of the United States Constitution and Article 1, Section 6 of the New York Constitution?

2. Whether the New York state immunity statutes (Secs. 381, 584 and 2446 of the Penal Law of 1909), granting a witness immunity from prosecution, or from

any penalty or forfeiture are deemed to include disbarment, since they are designed to give an immunity coexistensive with and as broad as the constitutional privilege?

3. Whether, in view of the constitutional privilege, the said immunity statutes, to be valid, must be so broad as to give a witness complete immunity, exemption or amnesty, in any proceeding, to wit, criminal, quasi-criminal or civil, and not leave him open to a disbarment proceeding, and thereby abridge the provisions and immunities guaranteed him as a citizen of the United States?

4. Whether the order of disbarment of the petitioner is repugnant to Amendments V and XIV of the Constitution of the United States of America, and Article 1, Section 6 of the New York State Constitution?

Constitutional Provisions Involved.

Amendments V and XIV, Section 1 of the Constitution of the United States, and Article 1, Section 6 of the Constitution of the State of New York.

Statutes Involved.

Article 34, Section 381 (a), of the New York State Penal Law of 1909 reads, in part, as follows:

> "2. In any criminal proceeding before any court, magistrate or grand jury, * * * the court, magistrate or grand jury * * * may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter. As amended L. 1936, c. 329; L. 1953, c. 891, Sec. 5, eff. September 1, 1953."

Article 54, Section 584 of the New York State Penal Law of 1909 reads, in part, as follows:

> "In any criminal proceeding before any court, magistrate, or grand jury, * * * for or relating to a violation of any of the provisions of this article, * * * may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter. * * *"

Article 218, Section 2446 of the New York State Penal Law of 1909 reads, in part, as follows:

> "If it be provided by this chapter or any other general or special law that a person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, or that testimony so given or produced shall not be received against him upon any criminal investigation, prosecution or proceeding * * *."

Article 218, Section 2447 (2) of the New York State Penal Law of 1909 reads, in part, as follows:

> "2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter of thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding * * *."

Statement of the Case.

The evidence in this disciplinary proceeding consists of sworn testimony of two witnesses and exhibits, together with a transcript of testimony given by petitioner, Lawrence S. Ingoglia, in the criminal trial, People of the State of New York v. Leland S. Beck and Anthony J. Meli, at which trial petitioner testified under a grant of immunity.

This testimony establishes that one, Anthony J. Meli, an attorney, was employed by the County of Nassau as a principal title examiner; that on occasion he would act as a negotiator in condemnation matters; that the County of Nassau had condemned a parcel of land owned by a certain corporation in Nassau County; that the County had offered the sum of $90,000 in settlement. One of the principals of the corporation testified that at least on one occasion he had spoken to Meli in connection with the negotiations for settlement. The petitioner testified in the criminal trial under a grant of immunity, that in or about January, 1963, Meli approached him and suggested to him that he contact the corporation for the purpose of representing the corporation in the condemnation matter, since the file indicated that while the offer that had been made to the corporation was $90,000, the condemnees ought to receive an award in the sum of at least $120,000. It was then agreed between the petitioner and Meli that they would share equally in whatever fee the petitioner was able to obtain from the corporation.

Thereafter, the petitioner, who knew the principals of the corporation, obtained a retainer calling for the payment to him as a fee one-third of any recovery over $90,000. Thereafter, the petitioner negotiated with the county attorney's office and at times spoke with Meli with respect to the progress of the negotiations.

Eventually, on or about May 18, 1963, the petitioner settled the corporation's claim with the county for $122,000 and received, on or about September 3, 1963, as his fee, the sum of $10,650. Thereafter, he paid to Meli, as agreed, the sum of $5,000 as a fee, by delivering a check dated September 26, 1963, in that amount to the order of one, Leland S. Beck, an attorney, who gave him a receipted bill dated September 27, 1963, indicating the fee was for consultation on the corporation condemnation

matter. Thereafter, on or about October 14, 1963, the petitioner forwarded to the Judicial Conference a statement of retainer, attached to which was an affidavit explaining that the late filing was due to inadvertence. The petitioner admitted this was untrue. Later, on or about November 22, 1963, the petitioner filed with the Judicial Conference a closing statement, in which he reported the sharing of his legal fee with the firm of Rothenberg & Beck and Leland S. Beck. Beck protested the use of his name in the closing statement and demanded that the closing statement be corrected. On or about November 26, 1963, the petitioner forwarded to the Judicial Conference a corrected closing statement deleting any reference to Leland S. Beck and Rothenberg & Beck and attached a letter thereto stating that his secretary had made a mistake in the original closing statement.

In or about the latter part of May, 1965, the Judicial Inquiry began an investigation with respect to certain aspects of this matter and on June 7, 1965, communicated with the petitioner and requested that he appear at the office of the Judicial Inquiry. The petitioner in his testimony admitted that he knew the Judicial Inquiry wished to speak with him at that time, but he failed to communicate with the Inquiry. Instead, he communicated with the District Attorney of Nassau County and eventually received the standard immunity from criminal prosecution.

The Judicial Inquiry, after completing its investigation, by order of the Appellate Division, Second Department, dated July 17, 1967, was authorized to institute disciplinary proceedings against the petitioner. The matter was referred to the Hon. L. Barron Hill, Justice, and after a hearing in December, 1967, found the petitioner guilty of the charges: "1," "2," "3" and "4."

The findings were confirmed by the Appellate Division on September 9, 1968 (30 A. D. 2d 921), and from that

decision appeal was taken to the Court of Appeals, which, as above stated, affirmed the order without opinion.

Reasons for Allowance of the Writ.

Petitioner urges the following reasons for the allowance of the writ:

1. The practice of law is not a matter of the state's grace and immunity may not be conditioned upon the surrender of a constitutional right, unless it is coextensive with and as broad as the privilege against self-incrimination.

In *Schware v. Board of Law Examiners of the State of New Mexico*, 353 U. S. 232, the United States Supreme Court reversed an order of the Supreme Court of New Mexico refusing to admit to the New Mexico Bar Examination a candidate whose "good moral character" had come into question because of his previous membership in the Communist Party and related acts. In reversing, the Court, per Mr. Justice Black, stated (at pp. 238-9):

> "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection clause of the Fourteenth Amendment * * * (page 239). Even applying permissible standards, officers of a state cannot exclude an applicant when there is no basis for their finding that he fails to meet those standards, or when the action is invidiously discriminatory."

The footnote referred to in the above is as follows:

> "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the state's grant of permission is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the state's grace. *Ex parte Garland* (U. S.) 4 Wall. 333, 379, 18 L. Ed. 366, 370."

It should be noted that in *Schware* the majority of the court decided that admission to the bar is protected by the Fourteenth Amendment and is a right that cannot be conditioned in a way that contravenes that amendment. Equally relevant here is the decision in *Konigsberg v. State Bar of California,* 353 U. S. 252, in which the court, again, in an opinion by Black, J., held that an applicant for admission to the bar could not be excluded from practice on the basis of a finding of lack of good moral character predicated upon his current nonconformist political views and his refusal to state whether he was, or ever had been, a member of the Communist Party.

It has long been held in New York that the practice of law is a privilege which the state may condition (*Matter of Rouss,* 221 N. Y. 81; *People ex rel. Karlin v. Culkin,* 248 N. Y. 465). There is nothing in *Schware* or in *Konigsberg,* or in any other case to contradict Judge Cardozo's statement in *Matter of Rouss,* characterizing the practice of law as "a privilege burdened with conditions." But what, the Supreme Court has held in *Schware* and in *Konigsberg,* is that the right to impose conditions is not absolute, and is limited by the Fourteenth Amendment.

Although it is true that a state, as such is not required by the Fourteenth Amendment to forbid self-incrimination, where it does so, as in New York through Article I, Section 6, of the State Constitution, to deprive an attorney of his means of livelihood by reason of his reliance on the grant of immunity under the Penal Law is inconsistent with due process.

The right to pursue a lawful calling is a property right (*People v. Gillson,* 109 N. Y. 389). Specifically, the right to pursue the practice of the law is such a right (*ex parte Garland,* 4 Wall. 333).

A privilege against self-incrimination is contained in the constitutions of forty-eight states, and in the statutes or common law of the remaining states (see 8 Wigmore, Evidence, Section 2252, n. 3, [McNaughton rev. 1961]; 58 Am. Jur., Witnesses, Section 36; Kroner, Self-Incrimination: The External Reach of the Privilege, 60 Col. L. Rev. 816, nn. 4-7 [1960]). To protect these privileges without sacrificing urgent investigations of crime, every state has passed statutes that grant immunity from prosecution for any state crime revealed by a witness, en exchange for the witness' testimony (see Wigmore, *supra,* Section 2281, n. 11). State courts have consistently held that by precluding prosecution by the state, an "immunity statute" effectively supplants the privilege against self-incrimination (see Wigmore, *supra,* Section 2281; Note, 38 A.L.R. 2d 225). The effectiveness of state immunity statutes should remain unimpaired. Due process (U. S. Const. Amend. XIV) obliges that the states to afford witnesses in state proceedings a privilege that is equivalent to the privilege against self-incrimination of the Fifth Amendment (*Malloy v. Hogan,* 373 U. S. 948). The right of an individual not to be a witness against himself is now regarded as a fundamental part of due process binding upon the state.

The state's power to compel testimony is generally upheld (see Wigmore, *supra,* Section 2258, n. 6; Kroner, *supra,* pp. 827-835; 58 Am. Jur., Witnesses, Sections 51, 89; Notes, 38 A.L.R. 2d 225; 82 A.L.R. 1380; 59 A.L.R. 895).

2. The Fifth Amendment inhibits the use in this proceeding of testimony resulting from the petitioner's immunity from both State and Federal prosecution therefor. Save for the label, there is no real distinction between a disciplinary and a forfeiture proceeding for the reason that both involve loss of property or property rights. The United States Supreme Court has recently held a forfeiture proceeding to be penal or quasi-criminal in nature. Since immunity must be as broad as the privilege against self-incrimination, the petitoner, Lawrence S. Ingoglia, is protected from disbarment.

The prime issue in this case is whether the loss of an attorney's office is a penalty or forfeiture within the meaning of the immunity statutes and, particularly, Section 381 of the Penal Law of 1909. If the loss of office is a penalty and forfeiture, then the petitioner herein is immune from disbarment for he testified, under subpoena from the District Attorney of Nassau County in the bribery prosecutions, and Section 2447 of the Penal Law provided at the time the testimony was given, that:

> "* * * 2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter of thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. * * *"

In *Matter of Kaffenburgh,* 188 N. Y. 49, the Court of Appeals flatly decided that an attorney's loss of his office as such is a penalty or forfeiture. That decision was in accord with every decision rendered upon the subject in the course of more than three centuries in the English courts, in the federal courts, in the courts of the other states and in the courts of this state. It is at once forti-

fied by immemorial authority and soundly based upon a broad and broadening principle.

The English cases all sustain the decision in the *Kaffenburgh* case that the holder of an office need not at common law give testimony that would subject him to a forfeiture of that office. "In what way he would be so subject, whether by indictment, information, impeachment, or if necessary, by a bill of pains and penalties, is immaterial; it is sufficient that he would be subject to penal consequences" (*Glynn v. Houston,* 1 Keen 329).

The rule against self-incrimination is, we believe, more nearly the work of Sir Edward Coke than of any other one man (see the very careful "History" of the privilege in 3 Wig., Section 2250, pp. 3079-3092, and especially pp. 3079-3080).

It will be noted that Judge Haight in the *Kaffenburgh* case pointed out that disbarment of an attorney is "a forfeiture of his office of attorney and counselor at law."

That the words "penalty" or "forfeiture" include disbarment, suspension from practice, and even censure, is strikingly confirmed by the constant use of these very words by the courts themselves in cases of professional discipline.

Thus in *Matter of Robinson,* 140 App. Div. 329, 338, the Court, after considering certain extenuating circumstances, said, per Ingraham, P.J.:

> "In consideration of these circumstances the court has concluded that it is not required to proceed to the extreme penalty of disbarment but that the respondent should be suspended from practice for a period of one year."

Clarke, Scott and Miller, J.J., concurred. Laughlin, J., dissented in respect to the punishment and voted for disbarment, saying of the respondent:

A statute giving immunity against incrimination, penalty or forfeiture, "should be construed to effect a practical and beneficient purpose, namely, at the same time to secure the witness in his constitutional right and to permit the prosecuting officer to secure evidence of a crime. It should not be construed so as to unduly impede, hinder or obstruct the administration of criminal justice" (*People ex rel. Hunt v. Lane*, 132 App. Div. 406, 409, 196 N. Y. 520).

The immunity given by Section 2447 of the Penal Law of 1909 is a substitute for the ancient common law and statutory privilege. And that privilege is regularly "applied in a broad and liberal spirit" (*People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 227).

We submit that *Matter of Rouss*, 221 N. Y. 81, where an attorney was disbarred for bribing a witness after testifying to this act in court under a grant of immunity from prosecution, should be re-examined. Rouss's claim in the disciplinary proceeding that the immunity protected him from disbarment, as well as from prosecution, was overruled. *Matter of Kaffenburgh* was distinguished by the late, lamented Judge Cardozo on the ground that since Rouss had revealed his criminal conduct, this could be used in the disciplinary proceeding, whereas Kaffenburgh had refused to testify and his lawful refusal could not be used against him in a disciplinary proceeding. We submit that the *Rouss* case should be re-examined for the following reasons:

Judge Cardozo overlooked the history of the immunity statutes of the state. That history makes it perfectly plain why immunity statutes prescribe a rule of evidence confined in its application to purely criminal cases, while laying down a principle of substantive law broad enough to include immunity from penalties and forfeitures, as well as immunity from indictment and conviction.

Judge Cardozo overlooked Section 2446 of the Penal Law. That section, passed after Section 584 of the Penal Law, was enacted before Rouss testified and was general in its nature. In our view, it makes the rule of evidence as broad as the rule of substantive law.

We shall develop these two considerations in their order.

The form of immunity statutes is stereotyped by the decision of the Court of Appeals in the case of *People ex rel. Lewisohn v. O'Brien* (176 N. Y. 253). Before that decision was rendered the rule of substantive law was no broader than the rule of evidence. By that decision, however, the Legislature was called upon to make two changes in the rule of substantive law, and none in the rule of evidence. One of those changes in the substantive law involved the inclusion of penalties and forfeitures.

A short review of the history of the subject will make perfectly plain why it is that the substantive rule of immunity laid down in former Section 584, and similar statutes, was broader than the rule of evidence, and why it is that the statutes expressly give immunity against penalty or forfeiture while making no mention of penalty or forfeiture in such of their causes as restrict the use of compelled testimony. The decision of the Court of Appeals in the well-known case of *People ex rel. Lewisohn v. O'Brien* (176 N. Y. 253), is the key to the entire mystery. The statute passed upon in the *Lewisohn* case was typical of all the immunity statutes passed before that case was decided. That statute, Section 342 of the old Penal Code, is quoted in the *Lewisohn* opinion (p. 258):

> "No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter, upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding."

The statute, it will at once be observed, did not give immunity from prosecution, penalty or forfeiture at all. It did two things only. It provided that no one should be excused from giving testimony upon the ground that such testimony would tend to convict him of a crime. And it added that such testimony could not be received against him upon any criminal investigation or proceeding. The principle of the legislation was, of course, that the witness was no worse off testifying under the statute than he would have been if he had not testified under the statute. As his "testimony cannot be received against him," the situation, it was thought, was substantially the same as if his testimony—though in fact compelled—had never been given. And a statute proceeding upon this principle was held constitutional by the Court of Appeals in *People ex rel. Hackley v. Kelly* (24 N. Y. 474).

Under the decision in the *Hackley* case, the United States Supreme Court decided the case of *Counselman v. Hitchcock* (142 U. S. 547). The Supreme Court in that case held a Federal statute almost identical with the one approved by the Court of Appeals in the *Hackley* case unconstitutional; upon the ground, substantially, that while the testimony of the witness could not be received against him, his position might nonetheless be impaired by the fact of his giving it. He might acquaint prosecuting officials by his own testimony with facts that they would otherwise not have known and which they might thereafter establish by the testimony of others. In the *Lewisohn* case the question for a second time came to the Court of Appeals with the decision of the Supreme Court of the United States before it. (Of course, recognizing that the Supreme Court's decision construing the provisions of the Federal constitution was not binding upon the Court of Appeals in its construction of the State constitution, the Court of Appeals, nonetheless, yielded to the authority of that court.) It sustained Lewisohn in

his failure to answer the question, "Have you ever been in the premises No. 3 East 44th Street (Canfield's place), in the city and county of New York?" (see the opinion at p. 257).

While, however, the Court of Appeals in the *Lewisohn* case proceeded primarily upon the ground that Lewisohn was not given sufficient protection against actual incrimination, it also said the following:

> "It is quite impossible for the court to say to what extent the witness, if he answered, would be criminated or placed in jeopardy. He might be subjected to proceedings involving penalty or forfeiture; he might be tried and convicted as a common gambler, which is declared by statute to be a felony."

The net result of the *Lewisohn* decision was, then, this:

In order to make its immunity provisions fully effective, the Legislature had to do two things. To meet the constitutional requirement it had to provide not merely that a witness's testimony should not be received against him, but also that he should not be prosecuted concerning any matter to which he had been compelled to testify. In order to avoid a renewed application of the common law and statutory principle against subjection to a penalty or forfeiture, the Legislature had to give immunity against penalties or forfeitures, too. It had, in a word, in two respects to change the *substantive law* of the subject. But there was no reason to change the rule of evidence at all. The rule of evidence already was that the testimony could not be used in a criminal proceeding. And there was no statutory or other objection to its use in a proceeding for penalty or forfeiture.

The Legislature, thus called upon to make two changes in the substantive law and none in the rule of evidence, did, in fact, make two changes in the substantive law and

no changes in the rule of evidence. To be concrete, the Legislature amended Section 342 of the Penal Code (Laws 1904, Chapter 649).

In order to make the course of legislation absolutely plain, we reprint in parallel columns the old and the new gambling section:

"No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter, upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding."	"No person shall be excused from attending and testifying or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of any of the provisions of this article, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding."

The fact that two changes were made in the substantive law and that no change was made in the rule of evidence is, of course, plain from a mere comparison of the statutes. The concluding clause defining the rule of evidence is

the same in both statutes except for the addition of the words "or produced" after the word "given." But there is express provision in the later statute against prosecution for the matter as to which testimony has been given and express provision that the witness shall not be excused because his testimony may subject him to penalty or forfeiture and again that he shall not be "subjected to any penalty or forfeiture". The new statute was approved by the Court of Appeals a year after the first one was disapproved. And Lewisohn was compelled to answer virtually every question.

In *Murphy v. Waterfront Commission*, 378 U. S. 52, the Supreme Court, in holding that the privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law, saying at page 78:

> "We must now decide what effect this holding has on existing state immunity legislation. In *Counselman v. Hitchcock*, 142 U. S. 547, this court considered a federal statute which provided that no 'evidence obtained from a party or witness by means of a judicial proceeding * * * shall be given in evidence, or in any manner used against him * * * in any court of the United States * * *'."

And again at page 79:

> "Applying the holding of that case to our holdings today that the privilege against self-incrimination protects a state witness against federal prosecution, *supra*, at 77-78, and that 'the same standards must determine whether (a witness') silence in either a federal or state proceeding is justified,' *Malloy v. Hogan, ante*, at 11, we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any

manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the states to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."

In Boyd v. United States, 116 U. S. 634, the court said:

"As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against them are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for the purposes of the Fourth Amendment of the Constitution. * * *"

And again at page 637:

"But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect a proceeding against the owner of the property, as well as against the goods for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited; and to require such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself."

See also:

Plymouth Sedan v. Pennsylvania, 380 U. S. 693.

To disbar the petitioner is to deprive him of his property upon incompetent evidence and to deny him the immunity guaranteed to him by the applicable provisions of the Penal Law and the State and Federal Constitutions, for the reason that it denies him, as an attorney, a right granted to every other class of citizens.

3. The disciplinary proceeding was brought against the petitioner to forfeit his license to practice law by reason of the acts committed by him. Suits for penalties and forfeitures incurred by the commission of offenses against the law are quasi-criminal in nature are within the realm of criminal proceedings for all the purposes of the Fourth Amendment to the Constitution and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.

***Boyd v. U. S.*, 116 U. S. 616 (634).**

CONCLUSION.

Wherefore, petitioner respectfully requests that this petition for a writ of certiorari be granted.

Dated: May 29, 1969.

Respectfully submitted,

BENNETT E. ARON,
JOSEPH B. LAMBERTA,
ROY E. MONACO,
Attorneys for Petitioner.

BENNETT E. ARON,
Of Counsel.

APPENDIX.

Order of Disbarment of Petitioner, Lawrence S. Ingoglia, Dated April 10, 1969.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on September 9, 1968.

HON. SAMUEL RABIN,
Acting Presiding Justice,
HON. JAMES D. HOPKINS,
HON. A. DAVID BENJAMIN,
HON. FRED J. MUNDER,
HON. M. HENRY MARTUSCELLO,
Associate Justices.

IN THE MATTER
of
LELAND S. BECK, PETER S. INGOGLIA, ANTHONY J. MELI and LAWRENCE S. INGOGLIA, attorneys.

HAROLD M. SPITZER,
Petitioner,

LELAND S. BECK, PETER S. INGOGLIA, ANTHONY J. MELI and LAWRENCE S. INGOGLIA,
Respondents.

[Four consolidated proceedings]

Disciplinary proceedings having been instituted upon the petitions of Harold M. Spitzer against the four respondents above named: (1) Leland S. Beck, an attorney and counselor at law admitted to practice by the Appellate Division of the Supreme Court, Third Department, on November 17, 1955; (2) Peter S. Ingoglia, an attorney and counselor at law admitted to practice by this court on November 6, 1929; (3) Anthony J. Meli, an attorney and counselor at law admitted to practice by this court on February 4, 1943; and (4) Lawrence S. Ingoglia, an attorney and counselor at law admitted to practice by this court on April 22, 1942; the said respondents having filed their respective answers; this court by orders dated September 27, 1967 having referred the issues raised by the pleadings in these four proceedings to Hon. L. Barron Hill, Justice of the Supreme Court, for hearing and report, together with his findings; the said Justice having in effect consolidated the proceedings by holding joint hearings thereon, and having filed his report dated April 5, 1968, together with the testimony and exhibits; the respondent Beck having moved by notice of motion, dated April 16, 1968, to confirm the report as to him; the petitioner having cross moved to disaffirm the report as to respondent Beck; and the petitioner having separately moved for confirmation of the report as to the three other respondents;

Now, upon the petitions, the respective answers of respondents; the said report, testimony and exhibits; the notices of motions and the memoranda of the parties; and upon all the papers filed herein, and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof; and Harold M. Spitzer, Esq., petitioner appearing *pro se;* Herman J. McCarthy, Esq., appearing of counsel for respondent Beck; Bennett E. Aron, Esq., appearing of counsel for respondent Lawrence S. Ingoglia; Rudolph Di Blasi, Esq., appearing of counsel for respondent Meli, and James R. Moffatt, Esq., appearing of coun-

sel for respondent Peter S. Ingoglia; and due deliberation having been had thereon; it is:

ORDERED that the Justice's findings in favor of respondent Beck and the Justice's findings to the effect that the charges against him have not been sustained, are hereby disaffirmed; and as to him this court hereby finds that the charges have been sustained by the proof and hereby makes the findings set forth in its said annexed opinion and decision slip; and it is further

ORDERED that respondent Beck's motion to confirm the Justice's report as to him is hereby denied; the petitioner's cross motion to disaffirm the report as to said respondent is hereby granted; and as to said respondent Beck the report, insofar as it relates to his guilt upon the charges, is hereby disaffirmed; and it is further

ORDERED that petitioner's motions to confirm the Justice's report as to the three other respondents, namely, Peter S. Ingoglia, Lawrence S. Ingoglia and Anthony J. Meli, are hereby granted and as to said three respondents the report and the findings therein are hereby confirmed; and it is further

ORDERED that, effective September 9, 1968, each of the three respondents—Peter S. Ingoglia, Lawrence S. Ingoglia and Anthony J. Meli—is hereby disbarred from the practice of the law, and the name of each of them is hereby directed to be struck from the roll of attorneys and counselors at law; and it is further

ORDERED, pursuant to statute (Judiciary Law, §90), that effective September 9, 1968, the said Peter S. Ingoglia, Lawrence S. Ingoglia and Anthony J. Meli, be and they hereby are commanded to desist and refrain: (1) from practicing law in any form, either as principals or as agents, clerks, or employees of another; (2) from appearing as attorneys or counselors at law before any court,

judge, justice, board, commission or other public authority; (3) from giving to another an opinion as to the law or its application, or any advice in relation thereto; and (4) from holding themselves out in any way as an attorney or counselor at law; and it is further

ORDERED that the respondent Leland S. Beck is hereby suspended from the practice of the law for a period of one year commencing October 9, 1968 and continuing until the further order of this court; with leave to apply to this court for reinstatement after the expiration of said period of one year, upon furnishing satisfactory proof: (a) that during said period he has actually refrained from practicing or attempting to practice as an attorney and counselor at law; (b) that he has fully complied with this order and with the terms and provisions of the written instructions governing the conduct and duties of suspended attorneys, a copy of such instructions being annexed hereto and made a part hereof; and (c) that he has otherwise properly conducted himself; and it is further

ORDERED, pursuant to statute (Judiciary Law, §90), that the said respondent Leland S. Beck, during the period of such suspension and until the further order of this court, be and he hereby is commanded to desist and refrain: (1) from practicing law in any form, either as principal or agent, clerk or employee of another; (2) from appearing as an attorney or counselor at law before any court, judge, justice, board, commission or other public authority; (3) from giving to another an opinion as to the law or its application, or any advice in relation thereto; and (4) from holding himself out in any way as an attorney or counselor at law.

Rabin, Acting P. J., Hopkins, Benjamin and Munder, JJ., concur.

Martuscello, J., concurs, except that he dissents from the punishment of total disbarment imposed upon the respondent Peter S. Ingoglia, and votes to suspend him from the practice of law for a period of one year.

ENTER:

HERMAN M. POGUL,
Clerk of the Appellate Division.

(Seal)

Opinion on Order of Disbarment.

Nos. 1334-1338, inclusive.

In the Matter of Leland S. Beck, an attorney.
Harold M. Spitzer, petitioner;
Leland S. Beck, respondent.
In the Matter of Anthony J. Meli, an attorney.
Harold M. Spitzer, petitioner;
Anthony J. Meli, respondent.
In the Matter of Peter S. Ingoglia, an attorney.
Harold M. Spitzer, petitioner;
Peter S. Ingoglia, respondent.
In the Matter of Lawrence S. Ingoglia, an attorney.
Harold M. Spitzer, petitioner;
Lawrence S. Ingoglia, respondent.

These are four separate proceedings to discipline the respective respondents, each an attorney, for professional misconduct. All proceedings stem from a certain land condemnation matter which had been pending in Nassau County. This court referred the disciplinary proceedings to a Justice of the Supreme Court for hearing and report. The Justice conducted a joint hearing of the four proceedings and has filed his report, finding (a) respondents Meli, Peter S. Ingoglia and Lawrence S. Ingoglia guilty of the charges, with certain stated exceptions, and (b) respondent Beck not guilty of the charges against him.

Respondent Beck now moves to confirm the report as to him. Petitioner cross-moves to disaffirm the report as to Beck and moves separately for confirmation of the report as to the other respondents.

Beck was admitted to practice on November 17, 1955 by the Appellate Division of the Supreme Court in the Third Department. The other respondents were admitted to practice by this court: Meli on February 4, 1943; Peter S. Ingoglia on November 6, 1929; and Lawrence S. Ingog-

lia on April 22, 1942. All of them have maintained offices in Nassau County.

The record of the proceedings herein discloses the following history with respect to the transaction which constitutes the basis for all the charges: In October, 1962 Meli was appointed to the position of Principal Title Examiner in the office of the County Attorney of Nassau County. The problem winding up Meli's private law practice was turned over by him to Beck, and Meli's name was placed on the door of Beck's law office. In January, 1963 Meli, in his new position in the County Attorney's office, dealt with a corporation, which was a claimant in a pending condemnation proceeding, in connection with a $90,000 offer which the claimant corporation had rejected.

Although Meli had been instructed to make no offer higher than $90,000, the County Attorney's file revealed to Meli a confidential appraisal of $130,000 to $140,000 and notations to the effect that the County would settle the corporation's condemnation claim for up to $120,000. Meli told the two officers of the claimant corporation that they might do better if they had an attorney. Thereupon, he mentioned the respondent Peter Ingoglia. The officers replied that they knew his brother, Lawrence Ingoglia. Meli told them he knew Peter well but Lawrence only slightly.

Shortly after this conversation, Peter Ingoglia arranged for Meli to speak with his brother Lawrence. Peter and Meli then went to Lawrence's office in Garden City. Meli advised Lawrence to solicit a retainer from the claimant corporation and at the same time disclosed to him the confidential figures from the County Attorney's file, which indicated that there was an appraisal considerably higher than the $90,000 offer and that the County would be willing to settle for any amount not exceeding $120,000. It was agreed that Meli would receive 50% of the fee paid by the claimant corporation to Lawrence. The corporation thereafter retained Lawrence.

The condemnation claim was eventually settled for $122,000; and for his fee Lawrence received a separate check of $10,600 from the County. Meli and Lawrence discussed the manner in which Meli's portion of the fee should be paid over to him, some concern having arisen between them as to income tax liability and as to whether payment to Meli should be by a $5,000 check or $2,500 in cash. When Meli and Lawrence could not agree, Meli went to Peter Ingoglia and, after some discussion, Peter told Meli that Lawrence would give a $5,000 check to Meli's nominee. Meli thereupon requested that the check be made payable to Beck and delivered to Beck as Meli's nominee.

On September 27, 1963 Beck, who upon the previous day had met Lawrence for the first time, accepted from Lawrence a $5,000 check, dated September 26, 1963, payable to Beck. Endorsed upon the check was this legend: "Fee for consultation on • • • [the name of the claimant corporation]—Legal Services." Beck gave Lawrence his (Beck's) receipted bill for the check, dated September 27, 1963. This receipted bill was on the letterhead of Beck's law firm and stated: "For services rendered in connection with consultation Re: • • • [the name of the claimant corporation]—$5,000." Beck claimed that he did not then know that the check was in connection with a condemnation matter. However, he raised no question as to the endorsement on Lawrence's check indicating that it was for legal services rendered by Beck; he deposited the check into his (Beck's) law firm's bank account on or about September 30, 1963, and issued two of his own checks, each in the amount of $2,500 and dated October 2, 1963, payable to Meli.

Thereafter, in November, 1963 Beck received from Lawrence a copy of a closing statement previously filed with the Judicial Conference which indicated that Beck had received part of the contingent fee from the claimant cor-

poration in the condemnation matter. Beck thereupon demanded that his involvement be reversed or expunged. Accordingly, Meli went to Peter Ingoglia and the following transpired: Meli gave Peter $1,000 in cash to cover Lawrence's tax liability; Peter gave Meli a $5,000 check (in exchange for money furnished by Lawrence); and Meli endorsed this check over to Beck. However, Beck demanded cash and, in compliance with such demand, Peter on December 16, 1963 made out a new check for $5,000 which he together with Meli cashed at a bank. Peter then gave the $5,000 in cash to Beck and in exchange Beck sent his $5,000 check to Lawrence Ingoglia.

At about the same time, Beck drew up a statement, without date, addressed to himself. This statement was signed by Meli. It purported to absolve Beck of any wrongdoing and asserted, *inter alia:* (a) that in early September, 1963 Meli had asked Beck to accept a $5,000 check upon Meli's false representation that the check was in connection with Meli's prospective retention of Beck as attorney in "a matter" in which Meli was involved; (b) that Meli had caused Beck's receipted bill for the $5,000 to be made out without Beck's knowledge or consent; and (c) that Beck had given Meli the two $2,500 checks upon Meli's request and statement that they "would discuss the matter later."

In June, 1965 Lawrence Ingoglia was called for questioning by the Nassau County Judicial Inquiry on Professional Conduct. Shortly thereafter, Peter Ingoglia procured from Meli a $5,000 promissory note, back-dated to December 16, 1963, to enable Peter, if also called for questioning, to use the note in support of the fictitious explanation he would offer about the $5,000 check which had been cashed in December, 1963 to undo Beck's involvement.

As to Meli, the reporting Justice found: (1) that he had attempted to conceal the wrongful payment of $5,000 to himself by using Beck as a conduit; (2) that Meli later tried to conceal the transaction by signing a back-dated

note with intent to mislead the Judicial Inquiry; (3) that he gave the Judicial Inquiry a false affidavit about the nature of his transaction with Lawrence Ingoglia; and (4) that he, Meli, gave perjured testimony at the hearings in these proceedings.

As to Lawrence Ingoglia, the reporting Justice found: (1) that he too knowingly used Beck as a conduit for the improper payment to Meli of $5,000; (2) that his, Lawrence's, original closing statement as to the condemnation matter, filed with the Judicial Conference, which showed that Beck had performed legal services and received a fee for such services, was false; (3) that his, Lawrence's amended closing statement, in which he attributed Beck's inclusion in the original statement to a secretary's error, was also false; and (4) that he, Lawrence, had refused to appear before the Judicial Inquiry on June 7, 1965 and on June 21, 1965.

As to Peter Ingoglia, the reporting Justice found: (1) that Peter, knowing of Lawrence's original wrongful payment to Meli, attempted to conceal that wrong by returning Lawrence's $5,000 to him through Meli and Beck; and (2) that Peter took the $5,000 promissory note from Meli in June, 1965 with intent to mislead the Judicial Inquiry and to conceal the wrongful payment to Meli, i.e., to create the false impression that Meli had borrowed $5,000 from him on the date of the note.

As to Beck, the reporting Justice found that he was an innocent conduit for the $5,000 payment to Meli and that the charges that Beck (1) had received and paid out the $5,000 to conceal the wrongful payment; and (2) had induced Meli to sign the statement purporting to absolve Beck from wrongdoing, were not proved.

We agree with the findings of the reporting Justice as to Meli and the Ingoglias. We disagree, however, with his findings as to Beck. We think there was ample evidence to sustain the charges against Beck. We deem the charges

against him to have been fully established by the proof, and we so find. It is our opinion and we find that: (1) Beck's acceptance of Lawrence's $5,000 check in September, 1963, with an endorsement thereon stating falsely that it was in payment for legal services rendered by him, Beck; (2) his rendition and delivery of the false receipted bill for legal services he knew he had never performed; and (3) his transmittal of the two $2,500 checks to Meli, clearly indicate his, Beck's, guilty knowledge of the other three respondents' wrongful scheme to have the respondent Meli improperly share in a legal fee procured as the result of his disclosure of the confidential information in the County Attorney's file and in direct conflict with the duties of his position in the County Attorney's office. We also are of the opinion and we find that Beck's preparation of the statement purporting to absolve himself, clearly demonstrates his awareness of the illicit scheme, his original participation and acquiescence in it and his belated attempt to insulate himself from blame.

Accordingly Beck's motion is denied and petitioner's motion as to each of the four respondents is granted.

In our opinion, respondents Anthony J. Meli, Peter S. Ingoglia and Lawrence S. Ingoglia are unfit to continue as members of the Bar. They are disbarred and their names are ordered to be struck from the rolls of attorneys and counselors-at-law, effective upon the date of this decision, namely, September 9, 1968.

As to Beck, however, his culpability is not of the same degree as that of the other respondents. While we find that Beck participated knowingly in this fraudulent scheme to permit Meli to obtain the $5,000, he was not a prime actor in the plan and, so far as the record discloses, received no pecuniary profit from it. We also take into consideration the evidence (noted in the Justice's report) that Beck cooperated with the Judicial Inquiry in its investigation. Nevertheless, his conduct does require some

disciplinary action. Under all the circumstances, we conclude that his suspension from the practice of law for a period of one year is warranted. Accordingly, Beck is herewith suspended from the practice of law for a period of one year, commencing October 9, 1968.

Rabin, Acting P. J., Hopkins, Benjamin and Munder, JJ., concur.

Martuscello, J., concurs, except that he dissents from the disposition with respect to respondent Peter Ingoglia, and votes to suspend that respondent from the practice of law for a period of one year, on the ground that his culpability was more or less of the same degree as that of Beck and, therefore, he should not be given a greater penalty than that imposed upon Beck.

Notice of Appeal by Petitioner, Lawrence S. Ingoglia, to the Court of Appeals.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

IN THE MATTER

of

LAWRENCE S. INGOGLIA,

Attorney-Respondent,

HAROLD M. SPITZER,

Petitioner.

SIRS:

PLEASE TAKE NOTICE that, the above named respondent hereby appeals to the Court of Appeals of the State of New York, from so much of the order as granted, *inter alia,* the petitioner's motion to confirm the Justice's report and the findings therein as to the respondent, Lawrence S. Ingoglia, and ordered that, effective September 9, 1968, the said respondent, Lawrence S. Ingoglia, be disbarred from the practice of the law and that his name be stricken from the roll of attorneys and counselors at law, and commanded him to desist and refrain from holding himself out in any way as an attorney and counselor at law, and from which order the said respondent's motion for leave to appeal to the Court of Appeals was denied, on or about the 14th day

of November, 1968, on the ground that an appeal lies as of right.

Dated: November 15, 1968

BENNETT E. ARON
Attorney for Respondent
Office & P. O. Address
575 Hempstead Turnpike
West Hempstead, New York
(516) 486-5667

To:

Clerk of the Court

Harold M. Spitzer, Esq.
Attorney for Petitioner
320 Old Country Road
Garden City, New York

Order of Affirmance of the Court of Appeals.

COURT OF APPEALS.

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 10th day of April in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

Witness,

The Hon. Stanley H. Fuld,
Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

REMITTITUR April 10, 1969.

2. No. 90 69

IN THE MATTER

of

LELAND S. BECK, & ors., Attorneys.

HAROLD M. SPITZER,

Respondent,

LELAND S. BECK, & ors.,

Appellants.

BE IT REMEMBERED, That on the 14th day of February in the year of our Lord one thousand nine hundred and sixty-nine, Leland S. Beck, & ors., Attorneys, the appellants in this cause, came here unto the Court of Appeals, by Reavis & McGrath, & ors., their attorneys, and filed in the said Court Notices of Appeal, where required by statute, and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Harold M. Spitzer, the respondent in said cause, afterwards appeared in said Court of Appeals *pro se*.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William R. Brennan, Jr., of counsel for the appellant Beck, and by Mr. John Joseph Sutter, of counsel for the appellant Peter Ingoglia, and by Mr. Richard E. Leavitt, of counsel for the appellant Meli, submitted by the appellant Lawrence Ingoglia, and argued by Mr. Edward Margolin, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of

Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, April 10, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

RAYMOND J. CANNON
Clerk.

FILED
JUL 22 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, [redacted] 1969

Docket No. 363

In The Matter
of
LAWRENCE S. INGOGLIA,
Petitioner,
against
HAROLD M. SPITZER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD MARGOLIN,
Respondent,
Chief Counsel,
Judicial Inquiry on
Professional Conduct
320 Old Country Road
Garden City, N.Y. 11530
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DONALD J. PAYTON
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1968

Docket No.

In The Matter

of

LAWRENCE S. INGOGLIA,

Petitioner,

against

HAROLD M. SPITZER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This brief is submitted in opposition to Petitioner's application for a writ of certiorari to this Court asking for a review, on constitutional grounds, of the decision of the Court of Appeals of the State of New York dated April 10, 1969 affirming an Order of Disbarment of the Appellate Division, Supreme Court of the State of New York, Second Department (30 A.D. 2d 921).

Question Presented

Is petitioner's testimony given under a grant of immunity at a criminal trial admissible against him in subsequent disciplinary proceedings.

The law is well settled that such testimony is admissible in disciplinary proceedings.

POINT I

Petitioner's challenge to the admissibility of a transcript of his criminal testimony in a disciplinary proceeding should be rejected.

The evidence in this disciplinary proceeding consists of sworn testimony of two witnesses and exhibits, together with a transcript of testimony given by Petitioner Lawrence S. Ingoglia in a criminal trial, People of the State of New York v. Leland S. Beck and Anthony J. Meli, at which trial Petitioner testified under a grant of immunity.

Petitioner contends that the introduction of his testimony given by him at the criminal trial of People of the State of New York v. Leland S. Beck and Anthony J. Meli violates his privilege against self-incrimination, in that the immunity granted him during the course of the trial and under which this testimony was given, protects him from its use against him in a disciplinary action.

We submit that the law is well settled to the contrary. This precise issue was long ago decided in *Matter of Rouss*, 221 N.Y. 81, and continues to be the law in this State today. (See also *Zuckerman v. Greason*, 20 N.Y. 2d 430, cert. denied 88 S.Ct. 856; *Matter of Farrel*, 20 N.Y. 2d 861; *Matter or Ungar*, 27 A.D. 2d 925, leave to appeal denied 20 N.Y. 2d 642, cert. denied 389 U.S. 1007; *Matter of Klebanoff*, 21 N.Y. 2d 920, cert. denied 37 LW 3120.)

The Petitioner further argues that *Matter of Rouss* should be re-examined in the light of substantive changes in the law made by the Legislature when it amended the immunity statutes to include the words "penalties and forfeitures". He contends that Judge Cardozo overlooked the significance of these words in his decision. We submit, however, that a review of the decision, at page 87 thereof, will indicate that Judge Cardozo did not overlook these principles but specifically defined them by stating:

> "*** Penalties and forfeitures, as the words are used in this exemption, are penalties and forfeitures imposed upon an offender as part of the punishment of his crime (citing cases). *** The legislature cannot have believed that in the interpretation of a grant of amnesty exemption from penalties and forfeitures would receive a broader meaning. Disbarment, therefore, is not within the range of the exemption."

We therefore submit that this interpretation is well sustained by precedent and reason and provides the Petitioner with sufficient protection consistent with his privilege against self-incrimination.

Petitioner in his brief further cites a line of criminal cases, i.e., *Boyd* v. *United States,* 116 U.S. 616, and *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, to support his contention that this immunity should be extended to disciplinary proceedings. We submit that the cases cited are criminal in nature and are easily distinguished.

The Fifth Amendment privilege relates to self-incrimination on charges of crime and by invoking this privilege the disclosures asked of a witness must expose him to punishment for crime (see *Zuckerman* v. *Greason,* 20 N.Y. 2d 430, cert. denied 88 S.Ct. 856). These disciplinary proceedings for professional misconduct are civil in nature and do not expose the Petitioner herein to punishment for

crime. They do, however, expose Petitioner to discipline for professional misconduct, which procedures are necessary to insure the orderly administration of justice and are expressly provided for by statute in this State (Judiciary Law, Section 90). This concept of the civil nature of disciplinary proceedings was long ago decided by this Court in *Ex Parte Wall,* 117 U.S. 265. Further, this Court has seen fit to incorporate this concept in its present rules concerning discipline for attorneys admitted to its Bar who have been guilty of professional misconduct (Rules of the Supreme Court of the United States, Revised Rule 8).

Petitioner's reliance on the *Boyd* and *Plymouth Sedan* cases (above cited) is equally misplaced. As this Court noted in Plymouth Sedan, the Boyd situation required a determination that the criminal law had been violated, the forfeiture there sought being authorized as an alternative to imprisonment and/or fine in the same statute. Consequently, if the claimant there were compelled to give testimony he would be asked to provide evidence to establish a violation of what this Court concluded was essentially a criminal statute.

CONCLUSION

The peition for writ of certiorari should be denied.

Respectfully submitted,

Dated: June 24, 1969

EDWARD MARGOLIN,
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